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No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1987

THE TIMES-PICAYUNE PUBLISHING CORPORATION,
GANNETT NEWS SERVICE, INC.,
CAPITAL CITY PRESS, JOHN MARVIN HILL,
MARK SCHLEIFSTEIN, BRIDGET O'BRIAN,
AND LINDA LIGHTFOOT,
Petitioners

v

EDWIN W. EDWARDS, MARION EDWARDS,
GUS MIJALIS, JAMES J. WYLLIE, JR.
AND RONALD F. FALGOUT,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, under the First Amendment, a presumption of openness attaches to proceedings arising during a criminal trial to inquire into possible tainting or bribery of the jury.

2. Whether, consistent with the First Amendment, a trial court may exclude the press and the public from these proceedings without affording interested persons a prior opportunity to be heard in opposition to closure; without making specific findings that closure is essential to preserve higher values and that closure is narrowly tailored to serve those interests; and without carefully considering alternatives to closure.

LIST OF PARTIES

The consolidated cases below are appeals from the closure of two separate mid-trial proceedings to inquire into the possible bribery or other tainting of the sequestered jury in the criminal racketeering trial of the incumbent Governor of Louisiana and four co-defendants. *United States of America v. Edwin W. Edwards, et al.* The petitioners are three of the news organizations that reported daily on the Edwards trial (The Times-Picayune Publishing Corporation,* Gannett News Service, Inc.,** and Capital City Press***) and reporters John Marvin Hill, Mark Schleifstein, Bridget O'Brian, and Linda Lightfoot, who were assigned by their respective news organizations to report on the criminal trial.

The respondents are the defendants in the criminal proceedings, Governor Edwin W. Edwards, Marion Edwards, Gus Mijalis, James J. Wyllie, Jr. and Ronald F. Falgout.

The United States of America did not appear as a party before the Court of Appeals.

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* The Times-Picayune publishes *The Times-Picayune*, a daily newspaper of general circulation in Southeast Louisiana. The Times-Picayune Publishing Corporation is wholly-owned through non-publicly traded intermediary corporations by Advance Publications, Inc., the Advance Voting Trust, sole voting stockholder.

** Gannett News Service, Inc. gathers news for newspapers, radio stations and television stations affiliated with Gannett Co., Inc. Gannett News Service, Inc. is a wholly-owned subsidiary of Gannett Co., Inc.

*** Capital City Press publishes the Baton Rouge, Louisiana *Morning Advocate* and *State-Times* newspapers. The shares of Capital City Press are not publicly traded.

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OPINIONS BELOW

The Opinion of the Court of Appeals (App. 1a) is reported at 823 F.2d 111. The orders of the District Court (App. 22a-31a) have not been reported.

JURISDICTION

The petitioners are three news organizations and their reporters who objected to, and appealed from, orders of the District Court closing to the press and public mid-

trial proceedings during the course of a criminal trial. Although the criminal trial of the respondents ended with their acquittal on May 10, 1986, it is well established that cases arising from closure orders of this nature do not become moot upon the conclusion of the underlying proceedings. A controversy of this kind is "capable of repetition, yet evading review." *Press-Enterprise Co. v. Superior Court*, 478 U.S. ——, 92 L.Ed.2d 1, 9, 106 S.Ct. 2735 (1986); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982); *Gannett Co. v. DePasquale*, 443 U.S. 368, 377-78 (1979).

The judgment of the Court of Appeals was entered on July 31, 1987. (App. 32a-33a). On August 31, 1987, the Court of Appeals denied a timely filed petition for rehearing. (App. 34a-35a). On October 21, 1987, Justice White ordered that the time for filing this Petition be extended to and including November 29, 1987.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

In September 1985, the incumbent Governor of Louisiana and seven co-defendants stood trial in federal court in Louisiana on multiple counts of racketeering, mail and wire fraud. The criminal trial of the State's governor was of great interest to the citizens of Louisiana and

generated intense publicity. (App. 2a). The jury was not sequestered. (App. 2a). Accordingly, the District Court entered a broad order which prohibited the trial participants from discussing the case publicly. (Order, United States District Court, March 8, 1985). The first trial ended in a mistrial when the jury could not reach a unanimous verdict as to the Governor and four of the seven co-defendants. (App. 2a).

The retrial of Governor Edwards and four co-defendants commenced in March, 1986. This time, the District Court ordered that the jury be sequestered (App. 2a); hence the court did not reimpose its order prohibiting public comment by the trial participants. Thus, from the outset of the second trial, the United States Attorney prosecuting the case, the Governor, his chief counsel, all other counsel, and the Governor's co-defendants were free to discuss the case publicly—which they did before television cameras and reporters on the courthouse steps each day, before, after, and at breaks in the proceedings.[1]

On two separate occasions during the retrial, reports reached the District Court that the sequestered jury had been tainted—including one report suggesting the possibility that an attempt had been made to bribe a juror. On April 17, 1986, a federal marshal reported to the District Court that one juror had commented to another juror that the jury in the Governor's first trial had been paid extra to vote for acquittal. (App. 3a).[2] The District Court informed all counsel in chambers, on the record,

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[1] It is undisputed that the trial participants were permitted to discuss all aspects of the second trial except for the proceedings at issue here. Indeed, at oral argument one judge of the Court of Appeals noted that he had observed the daily routine of public comment by the trial participants on the steps of the courthouse.

[2] Counsel for the respondents informed the Court of Appeals during oral argument about a report during the first trial that an acquittal vote was "going for $25,000." Also, according to counsel for the respondents, the FBI received a letter stating that two jurors in the first trial had been compromised. (App. 2a n.1).

of the report. (App. 3a). The prosecution immediately moved to excuse the jurors involved. (R.E. 72-73).[3] The prosecution suggested that the proceedings be conducted in open court. (R.E. 94-95). Defense counsel argued that proceedings conducted in open court could be intimidating to the jurors. (R.E. 94-95). The District Court then conducted closed proceedings in chambers during which motions to excuse two jurors were made; each juror was questioned at length by the Court and counsel; arguments were made by counsel; and the District Court denied the motions to excuse. (R.E. 72-119). The closed proceedings lasted more than two hours.

The District Court did not inform the press and public of its intention to conduct closed proceedings, meaning, of course, that the press and public had no opportunity to be heard on the issue of their exclusion. The individual petitioners and their many colleagues waited outside the courtroom, uncertain of what was transpiring in chambers, from 9:30 a.m., when the trial was to have resumed, until after noon, when the reporters observed counsel leave the Court's chambers. Counsel and the defendants told the reporters that the District Court had conducted unspecified closed proceedings in chambers but that the District Court had ordered all involved not to discuss the proceedings. Public comment on all other aspects of the trial remained wide open. At 1:15 p.m., petitioners filed an objection to the conduct of closed proceedings and to the sealing of the record of those proceedings. (App. 36a-37a). The petitioners specifically objected to the District

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[3] The redacted transcripts of the April 17 and April 22, 1986 closed proceedings were designated as part of the Record on Appeal in the Court of Appeals and copies were reproduced in Record Excerpts filed by Petitioners in that Court. In this Petition, "R.E. ——" refers to the pages of the Petitioners' Record Excerpts filed in the Court of Appeals. The unredacted transcripts of the closed proceedings were submitted to the Court of Appeals under seal. Counsel for petitioners have not been permitted to review them.

Court's failure to afford them an opportunity to be heard prior to closure. (App. 36a).

At 2:35 p.m. that same day, the District Court resumed taking trial testimony. The District Court filed an order sealing the record of the closed proceedings and ordering all counsel, the parties and court personnel not to discuss the matter publicly. (App. 22a-23a). The District Court's Order gave no hint of the seriousness or substance of the morning proceedings. The Order informed the public only that the Court had received a report that one of the jurors had discussed "some aspect of the previous trial" with another juror and that motions to excuse two jurors had been made by an unnamed party. (App. 22a). The District Court acknowledged that the jury was sequestered, but sealed the record of the proceedings because "there is a possibility, however slight" that the specifics of the motions to excuse might reach the sequestered jury. (App. 22a).

On April 21, 1986, the Petitioners filed a Notice of Appeal from the District Court's closure order. In addition, the Petitioners filed an Emergency Motion for an Expedited Appeal. (App. 4a n.2).[4]

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[4] In connection with the motion for expedited appeal, the Court of Appeals requested that the government advise the court of its position with respect to the closure of the April 17 and 22, 1986 proceedings. The government informed the Court of Appeals by letter of April 24, 1986 that "the Government's position is that the right of the public to a public trial in this instance outweighs any possible danger of breach of the jury sequestration." (R.E. 157). The Court of Appeals did not act on the petitioners' emergency motion until May 9, 1986, when the petitioners filed a Supplemental Memorandum advising that closing arguments were in progress, and that the court had not acted on petitioners' request for emergency relief. The Court of Appeals denied the petitioners' Emergency Motion for Expedited Appeal on the ground that the court saw no "abuse of discretion" by the District Court on the record submitted. The ruling was made without prejudice to further review on a "more complete briefing and a possibly fuller record. . . ." (App. 4a n.2, 20a-21a).

On April 22, 1986, the District Court received another report, this time from the matron suggesting that the jury may have been tainted. (App. 24a). According to the report, one juror had stated to another juror that each time the jury was dismissed one of the defendants would smile at the first juror and display an envelope. (App. 3a-4a). The first juror told the other juror that he could not help the defendant for less than $5,000. (App. 4a).

After receiving the matron's report, the District Court again conducted closed proceedings without informing the petitioners of its intention to do so and without providing the petitioners any opportunity to be heard. During the April 22, 1986 closed proceedings, the matron and the jurors involved were questioned by the Court and counsel; motions to excuse two jurors were made by several defense counsel; and counsel argued in support of and in opposition to those motions. (App. 4a; R.E. 124-155). Still in chambers, the District Court denied the motions to excuse. (App. 4a). The District Court dismissed the incident as "a tempest in a teapot, a joke." (App. 4a).

Later that day, the District Court issued another order sealing the record of the closed proceedings and prohibiting counsel, the parties and court personnel from discussing the proceedings. (App. 4a). The District Court's order made no mention that its inquiry related to possible bribery of the jury, but simply informed the public that the proceedings conducted in chambers involved "an incident in which a fellow juror commented about the actions of one of the defendants in the courtroom." (App. 24a).

At this point, then, although the trial participants were forbidden to discuss the closed proceedings, they remained free to engage in ongoing public comment on such diverse subjects as trial testimony, the motivation of the prosecutors, the guilt or innocence of the defendants, and related subjects. The District Court sought to justify its

order by explaining that jurors occasionally escape the boundaries of court supervision for such matters as medical appointments, contacts with family members and funerals (App. 24a-25a); but the District Court made no effort to reconcile those concerns with the continuing absence of any restriction on free public comment concerning all other aspects of the Governor's trial. The petitioners promptly supplemented their appeal to include review of the District Court's April 22 order. (App. 4a n.2).

On May 10, 1986, the jury returned a verdict of not guilty as to all defendants. (App. 4a). Shortly thereafter the petitioners moved for immediate access to the transcripts of the closed proceedings of April 17 and April 22, 1986. (App. 4a). After receiving memoranda from the respondents in opposition to unsealing the transcripts, the District Court on May 30, 1986 granted the motion in part and denied it in part, without a hearing. (App. 4a-5a, 30a-31a). The District Court held that it would release partial transcripts of the proceedings but would seal (apparently forever) the names of all jurors. The District Court also imposed a permanent seal on comments of counsel and the District Court itself dealing with "procedural matters," including any contemporaneous comments of the Court and counsel on the propriety of holding closed proceedings over the objections of the petitioners. (App. 4a-5a, 27a-30a). The petitioners appealed from that portion of the District Court's order which denied the petitioners' motion to unseal. The appeal was consolidated with the petitioners' prior appeal from the underlying closure orders of April 17 and April 22, 1986.

In their brief in the Court of Appeals, the respondents contended that the District Court was required neither to afford petitioners an opportunity to be heard, nor to make detailed findings as to the need for and scope of closure, on the ground that the mid-trial juror proceedings at issue constituted a bench or side bar conference.

(Brief for Appellees, pp. 18, 21-26, 29, 32).[5] At oral argument, however, the respondents acknowledged the length and contents of the proceedings (which included testimony, motions, and rulings thereon) and all but abandoned this contention. Instead, the respondents contended that mid-trial proceedings to determine possible bribery of the jury are so sensitive and unpredictable that public access to such proceedings is inherently disruptive. Accordingly, the respondents argued, mid-trial juror proceedings constitute a special class of trial proceedings which should not be subject to a First Amendment presumption of openness.

The Court of Appeals agreed with this contention and affirmed the District Court's orders in all respects. (App. 11a-13a, 16a, 19a, 32a-33a). The Court of Appeals held categorically that, because of their special sensitivity, "for first amendment purposes, no presumption of openness attaches to proceedings involving the midtrial questioning of jurors." (App. 12a). The Court of Appeals further held that, in the case of proceedings involving potential tainting of the jury, including possible juror bribery, there is no requirement that the press and public be afforded a prior opportunity to be heard on the issue of closure. (App. 12a-13a).

The Court also affirmed the District Court's orders denying the press immediate access to the transcripts of the closed proceedings without an opportunity for a hearing (App. 14a-17a), even though the jury was sequestered and the District Court had found that there existed only "a possibility, however slight" that the specifics of the proceedings would reach the jury. Although the District Court did not release the redacted transcripts for some

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[5] *Cf. Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, at 598 n.23 (Brennan, J. concurring in judgment) (interchanges at the bench and conferences in chambers distinct from trial proceedings and not subject to presumption of openness); *United States v. Gurney*, 558 F.2d 1202 (5th Cir. 1977).

six weeks after the conclusion of the closed proceedings, the Court of Appeals affirmed the District Court's action as reasonable. (App. 14a-17a). Finally, the Court of Appeals concluded that a right of privacy shields jurors from revelations about purportedly embarrassing interactions during the course of trial and affords the trial court broad discretion to keep portions of the record confidential to protect juror privacy. (App. 17a-19a). Thus, the Court of Appeals affirmed the District Court's permanent excision of the names of the jurors who had been the focus of the closed proceedings (App. 19a). Finally, invoking the rubric of brief sidebar conferences of court and counsel, the Court of Appeals affirmed permanent sealing of all colloquy of the District Court and counsel relating to "procedural matters," including all colloquy directly relating to closure of the April 17 and April 22 proceedings. (App. 17a, 19a n.8).

REASONS FOR GRANTING THE WRIT

The judgments at issue here arose from the federal racketeering trial of an incumbent governor. In that historic context, the Court of Appeals recognized that mid-trial proceedings to inquire into possible bribery of the jury go "to the very heart of public confidence in the fairness or appearance of fairness in judicial proceedings." (App. 10a). Nevertheless, the Court of Appeals concluded that mid-trial juror proceedings are not presumptively open and that the proceedings could be closed without affording the petitioners any prior opportunity to address the need for closure or the scope of closure in this case. (App. 12a-13a).

The Court of Appeals reached its judgment, first, by asserting in conclusory fashion that mid-trial juror proceedings traditionally have been closed; and, second, by undertaking its own balancing of the competing interests in open and closed proceedings as those interests apply generally to all mid-trial juror proceedings. By this cate-

gorical line of reasoning, the Court of Appeals excused the District Court's failure to afford the petitioners any chance to address the proper resolution of the competing interests in this case. The Court of Appeals' ruling excused the District Court's failure to make the strict findings that are prerequisite to the closure of presumptively open trial proceedings. *See, e.g., Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Press-Enterprise Co. v. Superior Court* (*"Press-Enterprise I"*), 464 U.S. 501, 510 (1984); *Richmond Newspapers v. Virginia*, 448 U.S. 555, 581 (1980).

This case, then, presents the important question whether the well-defined procedural and substantive framework of case-by-case closure adjudication established by *Globe* and other decisions of this Court can be short-circuited by a judicial determination that the need for secrecy outweighs the values of openness for an entire category of trial proceedings. The most serious consequence of this categorical determination is to deny interested persons like the petitioners any opportunity to express their opposition to closure, or to assist in shaping a proper alternative remedy, before both closure and the proceedings are a *fait accompli*. *Globe* itself struck down a legislative determination that the presumption of openness ought not apply to an entire category of trial proceedings. But the requirement of case-by-case adjudication applies with equal force to a judicial determination of categorical closure. Once a trial proceeding, as here, is found to implicate the "basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system," *Press-Enterprise I, supra*, 464 U.S. at 508, the First Amendment requires detailed, case-by-case reconciliation of the competing interests and an opportunity for interested persons to be heard. To our knowledge, no other Court of Appeals has concluded that a trial proceeding (other than a traditional sidebar or bench conference) may be closed absent compliance with this procedure, as *Globe* and its progeny require.

Globe, of course, is but one expression of fundamental First Amendment doctrine, which has long required highly specific, case-by-case reconciliation of competing constitutional interests when rights of free expression are at stake. The premises of the Court of Appeals' decision are sharply at variance with the basic First Amendment precepts in which *Globe* is rooted. The decision of the Court of Appeals requires the attention of this Court.

I. *Globe Newspaper Co. v. Superior Court* Requires That the First Amendment Right of Access to Specific Criminal Proceedings Be Determined by Weighing the Competing Constitutional Interests Involved on a Case-By-Case Basis.

The right of the public to attend criminal trials is now well established. "Closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness." *Press-Enterprise I*, *supra*, 464 U.S. at 509. Criminal proceedings can be closed to the public only if the trial court meets specific procedural and substantive requirements. The trial court must make

> specific, on the record findings . . . demonstrating that "closure is essential to preserve higher values and is narrowly tailored to serve that interest. . . ." If the interest asserted is the right of an accused to a fair trial, the . . . hearing shall be closed only if specific findings are made demonstrating that first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights.

Press-Enterprise Co. v. Superior Court (*"Press-Enterprise II"*), 478 U.S. ——, 92 L.Ed.2d 1, 13-14, 106 S.Ct. 2735 (1986) (citations omitted).

In *Globe*, this Court squarely held that a legislative determination that a particular type or category of

trial proceeding be closed without case-by-case adjudication is inconsistent with the First Amendment. There the Court held unconstitutional a Massachusetts statute which imposed a mandatory exclusion of the press and public from the trial of certain sex crimes during the testimony of a minor victim. The Court reversed a decision of the Massachusetts Supreme Judicial Court which had recognized the presumption of openness that attaches to criminal trials but held that trials involving sexual assaults constitute a "notable exception" to the presumption of openness. *Id.* at 601.

Although this Court readily acknowledged that the protection of the physical and psychological well-being of minors is a compelling interest, the Court held that even that important interest did not justify the blanket closure of all testimony by minor sex crime victims:

> [A]s compelling as that interest is, it does not justify a *mandatory* closure rule, for *it is clear that the circumstances of the particular case may affect the significance of the interest.* A trial court can determine on a *case-by-case basis* whether closure is necessary to protect the welfare of a minor victim. Among the factors to be weighed are the minor victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of parents and relatives.

Globe, 457 U.S. at 607-608 (footnotes omitted) (emphasis added).

Significantly, the Court also noted that to give meaning to the case-by-case resolution of competing interests, "representatives of the press and public must be given an opportunity to be heard on the issue of their exclusion." *Globe*, 457 U.S. at 609 n.25, *quoting from Gannett Co. v. DePasquale*, 443 U.S. at 401 (Powell, J., concurring). See also *id.* at 445-46 (Blackmun, J., concur-

ring; ". . . any person removed from a court should be given a reasonable opportunity to state his objections prior to the effectiveness of the order.")[6]

II. The Court of Appeals' Holding That Mid-Trial Proceedings and Motions Concerning the Tainting of the Jury are Categorically Outside the First Amendment Presumption of Openness Conflicts With *Globe's* Requirement That Closure of Trial Proceedings Must Be Determined on a Case-By-Case Basis, After Affording Interested Parties an Opportunity to Be Heard on Their Exclusion.

The Court of Appeals held that protracted mid-trial proceedings and motions to determine if the jury has been tainted or bribed fall outside the presumption of openness that attaches to criminal trials generally. Thus this case presents the question whether the important substantive and procedural requirements that go hand-in-hand with the First Amendment right of access to criminal trials may be abrogated categorically as to a particular portion of a criminal trial which the Court of Appeals characterized as especially sensitive to public scrutiny. Foremost among these procedural requirements, of course, is the requirement of a case-by-case determination of the need for closure, after an opportunity for interested parties to be heard, a requirement which the Court of Appeals found wholly inapplicable in this case by reason of the category of trial proceeding involved.

The Court of Appeals has created a class of proceedings outside the First Amendment right of access. The Court of Appeals reasoned, first, that mid-trial questioning of impaneled jurors has "traditionally been closed to the public" (App. 11a) and, second, that the public conduct of such proceedings invariably "would substantially raise

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[6] This Court's requirement of a prior opportunity to be heard on closure has been widely cited and followed by the Courts of Appeals. See n.10, *infra*.

the risk of destroying the effectiveness of the jury as a deliberative body." (App. 11a). Thus, the Court of Appeals concluded, juror misconduct proceedings conducted during trial are not presumptively open to the public;[7] they are not subject to the procedural and substantive requirements of *Richmond, Globe* and *Press-Enterprise I & II* (including *Globe's* requirement of case-by-case adjudication and an opportunity for those opposing closure to be heard); and the petitioner's First Amendment interests, and those of the public, can be satisfied adequately by a qualified right to delayed release of a transcript of the proceedings, expurgated in the broad discretion of the trial court to protect "privacy" interests of the jurors and whatever selected statements of counsel and the Court fall within the elastic concept of a "bench conference."

The Court of Appeals' central "historical" conclusion—that juror misconduct proceedings have "traditionally" been closed—is pure assertion. It is unsupported by citation to any caselaw, treatise, article, or authority of any kind. The petitioners specifically questioned this assertion in their briefs in the Court of Appeals and at oral argument. Decisions of the Fifth Circuit itself do not support the court's conclusion.[8] Historical evidence suggests that,

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[7] It is anomalous that a categorical exclusion from the presumption of openness would apply to mid-trial proceedings when the integrity of the jury specifically has been called into question but that routine, initial voir dire be subject to a strict presumption of openness, as *Press-Enterprise I* plainly requires.

[8] *See, e.g.*, in *United States v. Khoury*, 539 F.2d 441 (5th Cir. 1976) (*per curiam*), *cert. denied*, 429 U.S. 1040 (1977), where the defendant in a criminal action argued on appeal that the Court had improperly polled jury members in open court, rather than in chambers, to determine whether jurors had been tainted by a highly prejudicial news article. The Fifth Circuit rejected the defendants' argument and held that the District Court had not acted improperly by polling the jurors in open court. *See also Adjmi v. United States*, 346 F.2d 654 (5th Cir. 1965), *cert. denied*, 382 U.S. 823 (in-court questioning of jurors); *United States v. Sutherland*, 463 F.2d 641

to the contrary, there may have been longstanding recognition of the public nature of proceedings involving possible jury tainting.[9] At a minimum, the Court of Appeals' key historical premise is subject to serious doubt.

The second part of the two-part inquiry to determine if there is a First Amendment right of access to a particular proceeding is the "functional" test. In this second inquiry, "the court asks whether public access to the proceeding would tend to operate as a curb on prosecutorial or judicial misconduct and would further the public's interest in understanding the criminal justice system." *In re Washington Post Company*, 807 F.2d 383, 389 (4th Cir. 1986), *citing, inter alia, Globe*, 457 U.S. at 605-06 and *Press-Enterprise II*, 92 L.Ed.2d at 9-13. The functional analysis, as applied by this Court in *Globe* and in

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(5th Cir. 1972), *cert. denied*, 409 U.S. 1078 (jurors questioned in chambers and in open court); *United States v. Schrimsher*, 493 F.2d 848 (5th Cir. 1974) (jurors questioned in open court).

[9] For example, as a leading scholar of the history of the jury has noted, in the case of *Stephen Arrowsmith* (Old Bailey 1678), it is reported:

> Upon this the Jury went out again, and while they were deliberating, information was given to the Court, that they had the two Children [victims of the crime of statutory rape, with which Arrowsmith was charged] with them, which was against the Law. Whereupon the Officer appointed to keep them, was sent for, and it being sworn against him, that he had admitted them in, he was sent to *Newgate* [the jail near the Old Bailey], though he alleged [that] another Officer brought them to him as from the Court, but that Officer swore the contrary, and therefore the other was detained in Custody. *The Jury being sent for about this matter, when they came, said, they sent not for the Children, nor desired to have them*; and the Court to give further satisfaction, swore the Children, having examined them, whether they understood the nature of an Oath, and the danger of Perjury, which they gave a Rational account of. *And the Jury went away again.*

Cited and discussed in Langbein, *The Criminal Trial before the Lawyers*, 45 U. Chi. L. Rev. 263, at 293 (1978) (emphasis added).

both *Press-Enterprise* decisions, and by the Courts of Appeals in cases prior to the present one, stops at this point. Once the court has concluded that the type of proceeding under examination would serve important public purposes if allowed to remain open, competing considerations supporting closure are not weighed categorically or generically but are left to the scrutiny of case-by-case consideration on concrete facts.[10]

In the present case, however, the Court of Appeals has taken a markedly different path. Far from stopping with its own recognition of the strong functional reasons supporting open juror taint proceedings,[11] the Court of Ap-

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[10] *First Circuit: In re Globe Newspaper Co.*, 729 F.2d 47, 51-52 (1st Cir. 1984).

Second Circuit: In re New York Times Co., 828 F.2d 110, 114 (2d Cir. 1987) (access to documents); *In re Application of Herald Co.*, 734 F.2d 93, 97-98 (2d Cir. 1984).

Third Circuit: United States v. Criden, 675 F.2d 550, 555-557 (3rd Cir. 1982); *United States v. Smith*, 776 F.2d 1104, 1108-09, 1111-12, 1114-15 (3rd Cir. 1985) (access to documents).

Fourth Circuit: In re Washington Post Company, 807 F.2d 383, 389 (4th Cir. 1986); *In re Knight Publishing Co.*, 743 F.2d 231, 234 (4th Cir. 1984).

Sixth Circuit: Applications of National Broadcasting Co. and WKYC-TV 3, 828 F.2d 340, 344-345 (6th Cir. 1987).

Ninth Circuit: United States v. Brooklier, 685 F.2d 1162, 1167, 1170-71 (9th Cir. 1982).

Eleventh Circuit: Newman v. Graddick, 696 F.2d 796, 801 (11th Cir. 1983).

[11] The Court of Appeals stated:

> It is clear from the outset . . . that the values of openness are implicated in today's case. The issue of potential juror misconduct goes to the very heart of public confidence in the fairness or appearance of fairness in judicial proceedings. Once the spectre of a tainted jury is raised, public scrutiny of the resolution of the issue is essential, especially when, as here, the jury acquits.

(App. 10a).

peals proceeded to balance against these claims of openness its own evaluation of the need for closure in juror taint proceedings generally. (App. 11a-13a). This speculative description of the supposed sensitivity of juror taint proceedings to public view forms the centerpiece of the decision below—a categorical balancing of interests much like the reasoning of the Massachusetts Supreme Judicial Court upholding the closure statute at issue in *Globe* and rejected by this Court in that case. Similarly, this incorporation of a generalized interest balancing into the "functional" part of the closure analysis is directly at odds with prior decisions of this and other courts.

Granted that a mid-trial inquiry into bribery of the jury (like the testimony of minor victims of sex crimes in *Globe*) is a sensitive enterprise, and even assuming *arguendo* that questioning jurors publicly may in some circumstances complicate the process, *Globe* nevertheless requires that the competing constitutional interests applicable to a particular trial proceeding be reconciled in light of the specific circumstances of a particular case, after affording interested parties an opportunity to be heard, and after consideration of alternatives to total closure.[12] *Globe* teaches that a rule of categorical closure is not warranted simply because sensitive proceedings are

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[12] The Court of Appeals placed heavy reliance upon a qualified right of access to the transcript of mid-trial juror proceedings, which the Court viewed as a universal substitute for contemporaneous access to the proceedings. (App. 13a-14a). This remedy, however, reflects only another categorical resolution of the competing interests in open and closed proceedings. The considerations that require case-by-case adjudication of closure itself likewise require that specific alternatives to closure, including the release of transcripts, be considered on the record in the light of concrete facts. *See Nebraska Press Association v. Stuart*, 427 U.S. 539, 560 (1976) (government-imposed delays in publication, no less than outright prohibition, interfere with traditional press function of prompt news coverage and implicate First Amendment values).

involved, whether juror taint proceedings or the testimony of minor sex crime victims.

Globe and its progeny requiring case-by-case adjudication of closure rest on a solid foundation, both pragmatically and doctrinally. From a practical standpoint, this case well illustrates why this Court has required particularized examination of the need for closure of specific proceedings—as opposed to *a priori* sociological observations about the supposed impact of public presence. Here the jury was sequestered. Reports of possible bribery of a juror in the criminal trial of Louisiana's Governor had been received by the District Court. The reports, though ultimately determined by the court to be inconsequential, raised serious issues as to the integrity of the jury; indeed, questions of possible jury taint had been raised in the defendants' first trial. Yet the District Court sealed the entirety of these important proceedings—juror testimony, marshals' testimony, motions, rulings—based only on the speculation that there was a "possibility, however slight" that the specifics of the proceedings might reach the sequestered jury.[13]

Meanwhile, the parties and their attorneys remained free to comment publicly on every other aspect of the trial and did so daily. These comments were widely reported by television stations and newspapers throughout Louisiana. Neither the District Court nor counsel for any party ever suggested that sequestration was not fully effective to protect the jury from prejudicial exposure to

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[13] The District Court's "slight possibility" determination falls far short of the finding, prerequisite to closure of trial proceedings, of "a substantial probability that the defendant's right to a fair trial will be prejudiced . . ." *Press-Enterprise II*, *supra*, 92 L.Ed.2d at 13-14, and cases cited therein. Thus the judgment of the District Court could be sustained on appeal only if the proceedings at issue were removed categorically, as they were by the Court of Appeals, from the reach of this Court's decisions governing trial closure.

news reports about the trial itself.[14] But the District Court held no hearing to consider whether closure of the juror proceedings alone was arbitrary, whether closure would effectively protect the defendants' fair trial rights, or whether a less drastic alternative to total closure would suffice.[15] Case-by-case adjudication, then, is essential to the avoidance of indiscriminate and overbroad closure orders.

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[14] *See Nebraska Press Association v. Stuart, supra,* 427 U.S. at 563-64 (approving sequestration of the jury as an effective means of insulating the jury from prejudicial news reports).

[15] Reasonable alternatives existed that warranted careful consideration by the District Court, such as: closing only part of the proceedings (i.e., conducting the questioning of the marshal and non-jurors in open court, conducting the arguments on motions to excuse in open court, issuing rulings in open court and immediately releasing the transcript of any closed portion of the proceedings); permitting a press pool representative to be present during the questioning of jurors; or engaging in more careful supervision of the sequestered jury.

The Court of Appeals suggests that the District Court was presented "precipitously" with reports of possible jury irregularities, that the course of the ensuing proceedings was "unknowable," and that these "practical difficulties" precluded a pre-closure hearing and excused the trial court from "halt[ing] the proceedings to provide a midcourse discussion of reasonable alternatives to closure." (App. 13a n.5). In fact, however, there were no practical obstacles to proper pre-closure procedure and the suggestion to the contrary has no foundation in the record; neither the District Court nor the respondents ever advanced such a suggestion. The petitioners' counsel had served as liaison between the District Court and media representatives throughout the two Edwards trials; the same petitioners had raised prior access issues in the case and had appeared swiftly at the Court's request to discuss these issues; and, more mundanely, not only were the individual petitioners literally standing in the hallways for several hours as the closed proceedings unfolded, but the offices of petitioners' counsel also are located just across the street from the District Court. There was no exigency that justified the District Court's decision to conduct closed proceedings of several hours duration before affording petitioners even a brief chance to be heard.

The decision of the Court of Appeals profoundly conflicts with basic First Amendment doctrine. *Globe's* rejection of categorical closure is not unique to the analysis of the First Amendment interests in public access to criminal trials. Rather, *Globe* follows directly from the basic proposition, subscribed to by all of the plurality and concurring opinions in *Richmond Newspapers*, that, where governmental action potentially infringes on First Amendment rights, the action must be exactingly crafted to achieve the governmental interest at stake without unnecessary abridgement of other rights.

Countless decisions of this Court prior to *Richmond Newspapers* have clearly established that "[b]road prophylactic rules in the area of free expression are suspect. . . . Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963). Phrased another way, "a governmental purpose to control or prevent activities constitutionally subject to . . . regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 307 (1964). Accord, *Schaumburg v. Citizens for Better Environment*, 444 U.S. 620, 630 (1980), *reh. denied*, 445 U.S. 972. See generally Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844 (1970). In order to avoid undue imprecision, it is always necessary under the First Amendment to focus precisely on the competing interest asserted, to reach a judgment concerning its importance, and then to determine whether the interest can be achieved through measures less drastic than those the government has implemented. *See, e.g., Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 95-96 (1977); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217-18 (1975); *Gooding v. Wilson*, 405 U.S. 518, 521-22 (1972); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S.

449, 463-64 (1958); *see generally* Monaghan, *First Amendment "Due Process,"* 83 Harv. L. Rev. 518 (1970).

The mechanism for avoiding unnecessarily broad closure orders, expressly contemplated by the Court in *Globe*, by the plurality in *Richmond Newspapers* and by the dissenters in *Gannett Co. v. DePasquale*, is a hearing at which all interested parties are afforded an opportunity to be heard prior to closure at which the trial judge may explore in some detail the precise interests at stake and alternatives less burdensome than closure by which those interests might be served. Such a hearing permits the court to base its decision on particularized facts rather than vague speculation. General findings like those of the Court of Appeals in this case by their nature cannot be accurate in each individual case. *See generally First National Bank of Boston v. Bellotti*, 435 U.S. 765, 784-86 (1978), *reh. denied*, 438 U.S. 907. A pre-closure hearing is thus necessary to ensure that the First Amendment rights of the press and the public will not be abridged unnecesarily. That, at least, is the conclusion of virtually every other decision which has treated the issue in the wake of *Globe* and *Richmond Newspapers*.[16]

Although other Courts of Appeals have recently analyzed the prior hearing requirement as a matter of due process, *see, e.g., United States v. Raffoul*, 826 F.2d 218 (3rd Cir. 1987), to state that the First Amendment requires a hearing prior to closure is not necessarily to say that the hearing must be a full-blown evidentiary hearing. Certainly at a minimum it is necessary to provide that reasonable degree of participation which is necessary to guarantee a meaningful opportunity to influence the court's determination. *See generally Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 183-84 (1968). This case, however, does not require this

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[16] See cases cited at n.10, *supra*.

Court to define the parameters of the hearing requirement since the petitioners in this case were afforded no opportunity of any kind to be heard prior to closure.

Finally, the reach of the Court of Appeals' decision in this case is by no means confined to the facts of the two juror incidents which arose during the *Edwards* trial. Proceedings to examine impaneled jurors are not uncommon. More significantly, however, the decision below may be read as holding that each separate type of mid-trial proceeding that is not inescapably a part of every trial falls outside the holdings in *Richmond* and *Globe* that criminal trials are presumptively open to the public. According to the Court of Appeals, each different mid-trial proceeding may be subjected to generalized interest balancing under the "functional" rubric to determine whether the First Amendment presumption of openness "attaches" to that proceeding or does not.[17] If that presumption is found not to apply, the Court of Appeals' decision suggests that the proceeding may be closed without case-by-case adjudication or close scrutiny of the justification for closure. Indeed, in this case, the Court of Appeals upheld total closure of the proceedings based only upon the "possibility, however slight" of undue effect on a sequestered jury. Generalized interest balancing and its corollary, categorical closure, are incompatible with the basic premises of the Court's First Amendment access decisions.

In sum, then, the judgment of the Court of Appeals warrants review here not only because the decision is a significant departure from recent precedents of this Court, with potentially broad applicability in the future to other

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[17] Among the other proceedings which might be subjected to generalized closure analysis under the Court of Appeals' rationale are hearings to determine the mental or physical competency of a party to proceed or continue with trial; mid-trial motions to exclude evidence; hearings on motions relating to prosecutorial misconduct; and hearings on motions for a mistrial.

mid-trial proceedings, but also because the judgment below is inherently inconsistent with the bedrock First Amendment principle that infringement of First Amendment values must be narrowly tailored to support overriding governmental interests. The categorical closure of juror taint proceedings cannot be reconciled with this fundamental and well-established constitutional doctrine.[18]

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[18] The decision of the Court of Appeals also embraces another far-reaching constitutional assumption that conflicts with pronouncements of this Court and other circuits. Although no juror requested private questioning by the District Court, and the District Court's assigned reasons for closure were generalized concerns about the discomfiture and unease of the jury, the Court of Appeals determined that juror "privacy" interests warranted closure of the entire mid-trial inquiry in this case. *Compare Press-Enterprise I*, 464 U.S. at 515 (concurring opinion of Justice Blackmun; expressing concern that the Court "not assume the existence of a juror's privacy right without considering carefully the implications of that assumption;") and *Cable News Network v. United States and Deaver*), 824 F.2d 1046, 1048-1049 (D.C. Cir. 1987), *cert. denied*, 56 U.S.L.W. 3288 (October 19, 1987) (requiring individualized findings as to specific juror reasons for keeping private responses to specific voir dire questions; limiting juror privacy right to "deeply personal matters"; requiring affirmative juror request for private questioning; and requiring question-by-question analysis of need for closure).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Nos. 86-3298, 86-3495

UNITED STATES OF AMERICA,
Plaintiff,

v.

EDWIN W. EDWARDS, *et al.*,
Defendants-Appellees,

v.

TIMES PICAYUNE PUBLISHING CORPORATION, and
GANNETT NEWS SERVICES, INC., *et al.*,
Movants-Appellants.

July 31, 1987

Appeals from the United States District Court
for the Eastern District of Louisiana

Before WRIGHT,* GEE, and JOLLY, Circuit Judges.

GEE, Circuit Judge:

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* Circuit Judge of the Ninth Circuit, sitting by designation.

In today's case we find no first amendment violation in the closure of proceedings in which impaneled jurors were questioned about potential misconduct. We do conclude that the first amendment guarantees the public and press a qualified right of access to the record of such proceedings. Concerning permissible restrictions on this right of access, we find no constitutional infirmity in the trial court's orders declining to release transcripts of the closed proceedings during trial and his order permanently sealing portions of the record containing jurors' names and portions concerning issues traditionally discussed in bench conferences.

Facts

The appellants are three news organizations, the Times-Picayune Publishing Corporation, Gannett News Service, Inc., Capital City Press, and several of their reporters (referred to collectively as Times-Picayune). The adverse parties are the defendants named in the underlying action.

The press challenges proceedings and orders that arose during the second trial of Edwin Edwards and others for alleged racketeering and bribery. The first trial, a two and one-half month affair that generated much publicity, ended in a mistrial when the unsequestered jury was unable to reach a unanimous decision. In the second trial, the government moved that the jury be sequestered to protect it from "bias from outside influences." Besides the expected publicity, the first trial was tainted by rumors that jurors had been bribed.[1] The court ordered that the jury be sequestered in the second trial.

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[1] Counsel informs us that, during the first trial, defense counsel heard a report that an acquittal vote was "going for $25,000." Also, the FBI received a letter that two jurors in the first trial had been compromised.

Nine days into the trial the marshal reported that juror C had informed him as follows: juror B had remarked to juror C, "Did you know the last jury got paid for voting acquittal." The court and counsel conferred on record in chambers about how to proceed. The judge, the prosecutor, and two of the defense counsel questioned each juror individually in chambers, beginning with B and C. Juror C reaffirmed the original report; Juror B flatly denied it, later offering the substance of a conversation between the two jurors that may have been misconstrued by Juror C. During the course of these inquiries, the government suggested that they proceed in open court. The judge, urged by defense counsel, decided to continue informally in chambers, in order to encourage candor and to avoid intimidating the jurors. At the end of the proceedings, which lasted about two hours, motions to recuse were discussed. The judge determined that none of the jurors would be excused.

The press quickly filed an objection to this nondisclosure and to the lack of a preclosure hearing. Several hours later, without a hearing, the court ordered the record sealed and prohibited defense counsel and the prosecutor from making public comments about the issue. He explained only that the court had received a report that one juror had discussed "an aspect of the previous trial," and that motions to recuse jurors had been made and denied. He reasoned that nondisclosure was necessary "to preserve the impartiality of the jury," noting that "there is a possibility, however slight," that specifics would reach the jury. He cited an incident where marshals had already failed to cut out a small newspaper article in papers they had given to the sequestered jury.

Several days later, juror X reported to the matron that juror Y had confided that every time the jury was dismissed one of the defendants smiled and brought an

envelope to Y's attention; Juror Y states he is extremely nervous about this but says he couldn't help out for less than $5,000.

An *in camera* conference similar to the first one ensued, followed by questioning of jurors X and Y in chambers. Over the objections of the "offending" defendant's attorney, the court denied a motion to recuse the jurors involved, characterizing the event as a "tempest in a teapot, a joke." The court issued an order, describing the incident as one in which a juror relayed that "a fellow juror commented about the actions of one of the defendants in the courtroom." The order states that after questioning of the jurors' motions to recuse were denied, concluding that the juror's comment was of a "joking nature." The transcript was sealed because of the "possibility of specifics reaching the jury given the circumstances surrounding sequestration." The order goes on to discuss the necessity of permitting some public activities for jurors during a lengthy sequestration.

The jury returned a verdict of not guilty as to all defendants. Shortly thereafter the Times-Picayune filed a motion seeking full and immediate access to the sealed record. Some two weeks later, after receiving opposition and reply motions, the district judge issued a final order.[2] He released redacted transcripts from which he

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[2] Shortly after the first incident, Times-Picayune filed an expedited appeal to this Court, which it later supplemented to challenge the judge's management of the second incident. A panel of this Court denied the emergency motion for expedited appeal and petition for writ of mandamus. Based on the record before it, which included the full transcript of the challenged proceedings, the panel found no error in the closure or ban on public comment. It added, however, that its ruling was without prejudice to further review, with more complete briefing and a potentially fuller record, adding that the trial court should at the first instance decide after trial whether to perpetuate his order. Order, *United States v. Edwards*, et al., No. 86-3298 (May 9, 1986).

had eliminated jurors' names, portions that included "comments made by counsel which are not part of the arguments to excuse," parts dealing with "procedural matters," and portions that "if released would be unnecessarily embarrassing to the jurors involved." He lifted the prohibition on public comment, except as to those matters remaining under seal.

Times-Picayune raises a first amendment challenge to 1) the closure of the proceedings 2) the midtrial orders sealing the record and imposing a ban on public comment about the proceedings during the trial 3) the lack of a hearing for the press before closure and before the court issued its midtrial orders, and 4) the post-trial order that permanently seals portions of the record, notably jurors' names. The defendant-appellees assert that neither the court's actions nor its orders violate the first amendment.

The Law

We have jurisdiction under 28 U.S.C. § 1291. Insofar as any issue might be considered moot, the Supreme Court has determined that trial closure issues fall within that category of disputes that are "capable of repetition, yet evading review." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 563, 100 S.Ct. 2814, 2820, 65 L.Ed. 2d 973 (1980); *see also United States v. Gurney*, 558 F.2d 1202, 1207 (5th Cir. 1977), *cert. denied*, 435 U.S. 968, 98 S.Ct. 1606, 56 L.Ed.2d 59 (1978).

Some background is helpful in following the parties' arguments. In *Richmond Newspapers, Inc.*, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980), the Supreme Court recognized on behalf of the public and press a qualified first amendment right of access to criminal trials. Then in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982), the Court declared unconstitutional a Massachusetts law mandating closure of trials concerning sex offenses

against minors, requiring instead a case-by-case approach to justifying closure. In *Press-Enterprise Co. v. Superior Court of Cal.* (*Press I*), 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984), the Court held that the closure of all but three days of a six-week voir dire proceeding violated the first amendment. *Press II* followed. *Press-Enterprise Co. v. Superior Court of Cal.*, 478 U.S. ——, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986). The proceeding at issue was a preliminary hearing, a procedure under the California penal code designed to determine whether there is probable cause to bind the defendant over for trial. That highly publicized case involved a nurse accused of killing patients with massive doses of a heart drug. The preliminary hearing took 41 days; only the prosecution presented evidence. The district court closed the proceedings and refused to release transcripts based on "a reasonable likelihood that release might prejudice the defendant's right to a fair and impartial trial." *Id.* at ——, 106 S.Ct. at 2739, 92 L.Ed.2d at 8. The Supreme Court held that the first amendment right of access to criminal proceedings extends to a preliminary hearing, that total closure of the prolonged hearing was insufficiently justified, and that it was therefore constitutionally infirm.

Following the principles in *Richmond*, *Globe*, and *Press I*, the Court in *Press II* recapitulated the two "complementary considerations" for determining whether a first amendment right of access attaches to the proceedings at issue: the court must determine (1) "whether the place and the process has historically been open to the press and general public," and (2) "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.* at ——, 106 S.Ct. at 2740, 92 L.Ed.2d at 10.

Press II reaffirms the guiding principles: that although the first amendment right of access is not absolute, once the right to access attaches the presumption

of openness can be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. *Id.* at ——, 106 S.Ct. at 2743, 92 L.Ed.2d at 13 (citing *Press I* and *Globe*). Even though pretrial publicity posed a potential threat to the defendant's right to a fair trial, the *Press II* Court nevertheless recognized a presumption of openness concerning preliminary hearings and established that a preliminary hearing may be closed only if there are specific findings demonstrating a "substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent" and that "reasonable alternatives to closure will not protect" the defendant's right to a fair trial. *Id.*

Attachment of the First Amendment Right of Access

We must first ascertain whether a first amendment right of access attaches. Times-Picayune argues that a first amendment right attaches here, characterizing the challenged proceedings as "supplemental voir dire" and relying on *Press I*. It asserts that we should look through the court's labeling of the procedures as "in chambers" conferences, as opposed to "trial proceedings," and perform a functional analysis. For example, in *United States v. Chagra*, 701 F.2d 354 (5th Cir.1983), we recognized a first amendment right to access to pretrial bail proceedings. In addition, the press argues, in *Rovinsky v. McKaskle*, 722 F.2d 197 (5th Cir.1984), our Court found that the defendant's sixth amendment right to a public trial was violated when the trial court conducted conferences in chambers to decide motions to limit the cross examination of two witnesses. In so doing, the Court ignored the "in chambers" label. Relying instead on first amendment access principles, the Court examined the "relationship of the issue at the hearing to the merits

of the charge, the outcome of the prosecution and the *integrity of the administration of justice.*" *Id.* at 201 (emphasis added).

Times-Picayune points to the Supreme Court's explications of the values served by open proceedings. For example, openness "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press I*, 464 U.S. at 501, 104 S.Ct. at 819. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond*, 448 U.S. at 572, 100 S.Ct. at 2825. The press notes that in today's case this was the second trial in which the governor and his codefendants were charged with bribery. The first (mis)trial was tainted with rumors that the jurors were bribed. The alleged misconduct here was a juror's discussion of bribery and a juror's impression that a defendant was offering a bribe. This, the press argues, directly implicates public confidence, or lack thereof, in the integrity of criminal proceedings and thus invokes the value of openness.

Adverting to the same line of cases, the defendants contend that because this type of proceeding has not historically been open, no first amendment right of access attaches. Therefore, the first amendment neither requires that this type of proceeding be conducted in open court, nor that the public and press obtain immediate and unfettered access to the record emanating from such proceedings.

Analysis

Our reading of precedent confirms that the Supreme Court has been careful to insulate this type of proceeding from unwarranted intrusion by the press and public. In *Richmond*, the Court recognized a presumption

of openness concerning criminal trial proceedings, but the Court was careful to include this caveat:

> We have no occasion here to define the circumstances in which all or parts of a criminal trial may be closed to the public . . . but our holding today does not mean that the First Amendment rights of the public and representatives of the press are absolute. Just as a government may impose time, place, and manner restrictions . . . so may a trial judge, in the interest of the fair administration of justice, impose reasonable limitations on access to trial. " '[T]he question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge . . . the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places.

448 U.S. at 581 n. 18, 100 S.Ct. at 2830 n. 18 (quoting *Cox v. New Hampshire*, 312 U.S. 569, 574, 61 S.Ct. 762, 765, 85 L.Ed. 1049 (1941)).

In *Press I*, the Court cited this language with approval. 464 U.S. at 509 n. 10, 104 S.Ct. at 824 n. 10. In his concurrence in *Richmond*, Justice Brennan viewed the presumption of public trials as "not at all incompatible with reasonable restrictions":

> Thus, when engaging in interchanges at the bench, the trial judge is not required to allow public or press intrusion upon the huddle. Nor does this opinion intimate that judges are restricted in their ability to conduct conferences in chambers, inasmuch as such proceedings are distinct from trial proceedings.

448 U.S. at 598 n. 23, 100 S.Ct. at 2839 n. 23.

The *Globe* Court cited this language with approval. 457 U.S. at 609 n. 25, 102 S.Ct. at 2621 n. 25. Our own court has explicitly acknowledged that bench conferences

are outside public hearing and the protection of their privacy is generally within the court's discretion. *Gurney*, 558 F.2d at 1210 (citing *United States v. Nixon*, 418 U.S. 683, 714, 94 S.Ct. 3090, 3110, 41 L.Ed.2d 1039 (1974)).

This sort of discretion historically extends to "jury matters." In *Gurney*, we affirmed that the press had no right of access to written communications between the judge and jury during deliberations; neither were they entitled under the first amendment to a list of jurors' names and addresses. *Id.* In a case involving restrictions on the press concerning their interviewing of discharged jurors, we stated: "A federal judge is not the mere moderator of a jury trial; he is its governor for the purpose of insuring its proper conduct." *United States v. Harrelson*, 713 F.2d 1114, 1117 (5th Cir.1983) (citing *Herron v. Southern Pacific Co.*, 283 U.S. 91, 51 S.Ct. 383, 75 L.Ed. 857 (1931)). We reconfirmed in *Harrelson* that the trial court is accorded broad discretion, "based on law and on his own and common experience," over aspects of the trial concerning the "handling of jurors," e.g. sequestration, juror access to information, and "harassment of jurors." *Id.* at 1117.

It is clear from the outset, however, that the values of openness are implicated in today's case. The issue of potential juror misconduct goes to the very heart of public confidence in the fairness or appearance of fairness in judicial proceedings. Once the spectre of a tainted jury is raised, public scrutiny of the resolution of the issue is essential, especially when, as here, the jury acquits. Applying the Supreme Court's test of "experience and logic" thus leads us, not to a facile answer, but to a quandary: the values of openness are significantly implicated in jury misconduct matters, yet the management of such matters, including control over the place and manner in which "jury" proceedings are conducted,

has historically been subject to the broad discretion of the trial court.

We turn to functional considerations for an answer. Experience and logic do indeed provide the reasons why midtrial proceedings involving the questioning of jurors have traditionally been closed to the public: holding such proceedings in open court would itself introduce an element of bias and would substantially raise the risk of destroying the effectiveness of the jury as a deliberative body. Whenever one juror reports the potential misconduct of another, the jury as an institution is instantly cast in jeopardy. It is vitally important to all parties, and it is the duty of the court, to ascertain whether the "offending" juror is biased and whether a taint of bias has affected other jurors. This process is different in several respects from the other types of proceedings found by the high court to be presumptively open—differences not of degree, but of kind. Wrenched from their neutral posture, the jurors themselves are suddenly cast on the defensive, facing counsel who are now their cross-examiners, a most difficult situation for all. During voir dire of potential jurors, counsel is armed both with challenges for cause and with peremptory challenges; counsel can probe to elicit indications of bias. Here, the jury, with a limited number of alternatives, is fixed.[3] At the risk of alienating sitting jurors, counsel must delicately ascertain whether bias now infects one or more of them, a task made doubly difficult when the juror accused flatly denies the claim. This process itself can create undesirable bias against the defendants whom counsel represent. The deleterious effects can only be exacerbated by requiring jurors to "defend" themselves in open court. As the process takes on an adversarial nature, counsel will likely demand recusals, even of those jurors whom they believe were not biased before the

[3] We note in passing that one juror had already been excused before these incidents occurred.

proceeding. The potentially divisive effects on relationships between jurors would be exacerbated by a "public hearing." If involved jurors are retained, the reservoir of goodwill between jurors, so important to reaching group consensus, is drained, thus increasing the potential that deliberations will end with a hung jury. If involved jurors are retained and the jury does convict, the defendant will almost surely contend on appeal that his sixth amendment right to a fair trial was violated.[4]

If the questioning of impaneled jurors were held in open court, there is a substantial probability that what may have begun as a "tempest in teapot" will end in a mistrial, a hung jury, or a reversal on appeal. The interest in preserving the jury as an impartial, functioning, deliberative body is not only a higher value than that served by openness here, it is a *sine qua non* of our system of criminal justice as envisioned in the sixth and seventh amendments. Thus, for first amendment purposes, no presumption of openness attaches to proceedings involving the midtrial questioning of jurors. It fol-

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[4] A First Circuit case illustrates. In *United States v. Corbin*, 590 F.2d 398 (1st Cir. 1979), one juror reported that she had heard another juror state "He's guilty, he's guilty." The judge, with counsel present, questioned all jurors under oath. The offending juror vigorously denied having made the statement. Satisfied that the other jurors had not heard anyone make such a comment, the court found that the offending juror did not make the comment, but nevertheless took the step of excluding him from the jury, "in order to do whatever can be done, short of starting all over again next year, to rid the jury of any possible taint." The defendant, who was eventually convicted, challenged the court's failure to declare a mistrial, asserting that the court's investigation and findings were insufficient.

As this Court noted in *Harrelson*, while it is possible for the trial court to act with undue restrictiveness in jury matters, it is also possible for him to be too lax and to suffer reversal for that reason. 713 F.2d at 1117.

lows that the trial judge did not err in failing to provide a preclosure hearing.[5]

Disclosure of Transcripts

We find in *Press I* a framework for accommodating the values served by public access and the practical necessities of judicial administration of jury trials. In *Press I*, a rape case, the district court closed voir dire because he anticipated that jurors would be asked highly personal questions. The Supreme Court found unconstitutional the prolonged and total closure of the 41-day voir dire process. The Court noted however that a trial judge may "in the interest of the fair administration of

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[5] In so holding, we do not foreclose the possibility that the first amendment, under circumstances not presented in today's case, might require that proceedings involving the questioning of jurors be held in open court. We find no factors here, nor reasonable alternatives to closure, that would effectively mitigate the negative effect that open proceedings would have on the functioning of the jury as an institution. We note in passing that, to sustain a first amendment challenge, factors must exist to demonstrate that open proceedings would play a "significant positive role" in the functioning of the particular proceedings in question. *Press II*, 478 U.S. ——, 106 S.Ct. at 2740, 92 L.Ed.2d at 10.

It follows that, if such factors are timely brought to the trial court's attention, a preclosure hearing may be warranted. The practical difficulties of holding a hearing may, of course, preclude that possibility, as in the circumstances presented here.

The report of potential "jury misconduct" was precipitously presented to the trial judge. The proceedings that ensued were not analogous to the scheduled proceedings at issue in *Richmond* and its progeny, where the judge could question counsel to ascertain the anticipated contents of the proceedings. Here, the content and course of development of the proceedings were unknowable. Both sets of proceedings were confined to the questioning of jurors only; each inquiry lasted less than two hours, consuming less than four hours of time in a six-week trial. In these circumstances, there is no need for the court to halt the proceedings to provide a midcourse discussion of reasonable alternatives to closure.

justice, impose reasonable limitations on access." 464 U.S. at 511 n. 10, 104 S.Ct. at 824 n. 10.[6]

The Court suggested a reasonable alternative to accommodate all competing interests: "When limited closure is ordered the constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceedings available within a reasonable time." 464 U.S. at 512, 104 S.Ct. at 825.

Likewise, in today's case the availability of the transcript is the key to satisfying the constitutional values of public scrutiny. We conclude that the first amendment guarantees a limited right of access to the record of closed proceedings concerning potential jury misconduct and raises a presumption that the transcript of such proceedings will be released within a reasonable time.

Disclosure Within a Reasonable Time

Times-Picayune argues that release must be contemporaneous, relying on *Associated Press v. United States District Court*, 705 F.2d 1143 (9th Cir.1983). In that case, the Ninth Circuit held that the across-the-board sealing, albeit for only 48 hours, of all pretrial documents was impermissible. We note, however, that the constitutional violation in *Associated Press* rested on the lack of a showing sufficient to justify the blanket order sealing *all* documents, the availability of less restrictive alternatives, and the improbability that the closure orders would have any significant positive effect, given the extensive and continuing pretrial publicity in that case.

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[6] The *Press I* Court again reiterated that the question is "whether that control is exerted so as not to deny or unwarrantedly abridge . . . the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places." 464 U.S. at 511 n.10, 104 S.Ct. at 824 n.10 (citing *Richmond*, 448 U.S. at 581-82 n.18, 100 S.Ct. at 2830 n.18).

The gravamen of the constitutional infirmities found in *Associated Press* are far afield from our inquiry, which addresses the timing of the (already-presumed) disclosure of the record.

The press contends that the first amendment mandates midtrial disclosure, because sequestration is sufficient to protect the jury from exposure to publicity. To the contrary, we conclude that, despite sequestration, midtrial publicity does continue to threaten the impartiality of the jurors. We previously noted the special volatility of publicity when it is focused, not on the merits of the case, but on the jurors themselves. If the substance of such incidents is played out in the press during trial, the difficulty is in insulating the jurors, not merely from media reports, but from remarks offered by others. As the district court noted, even when jurors are sequestered they are by necessity exposed to outsiders, from family members to fellow patrons in the doctor's office. The jurors are under a duty to report all untoward exposure to external information. Dutiful reporting by jurors necessitates further questioning in chambers, which leads to further media reports, from which all twelve jurors must be insulated. What may have begun as sound and fury can degenerate into a comedy of errors, only one of which need be harmful for the jury trial to be rendered a nullity.

Weighing against these difficulties are the values of prompt release. We recognize the worth of timely news reported on the front page and, by contrast, the diminished value of noteworthy, but untimely, news reported on an inside page. Implicit in that assessment, however, is the fair assumption that significant news will receive the amount of publicity it warrants. The value served by the first amendment right of access is in its guarantee of a public watch to guard against arbitrary, overreaching, or even corrupt action by participants in ju-

dicial proceedings. Any serious indication of such an impropriety, would, we believe, receive significant exposure in the media, even when such news is not reported contemporaneously with the suspect event.

The issue, simply stated, reduces to "Better sooner than later"? Given the paramount interest in maintaining an impartial jury, and its inherent vulnerability, we find no error in the district court's refusal to release transcripts of the closed proceedings before the jury reached its verdict. The trial court should nevertheless avoid unnecessary delay in releasing the record of closed proceedings after trial. When a motion is made for release of transcripts, the trial court should anticipate their probable post-trial disclosure and endeavor to release them as soon after verdict as possible.

Procedural Protections

In requiring a case-by-case resolution of the issues concerning closure of presumptively open proceedings, the *Globe* Court noted that, for this approach to be effective, "the press and general public must be given an opportunity to be heard on the question of their exclusion." 457 U.S. at 610 n. 25, 102 S.Ct. at 2621 n. 25. *Press II* requires, if closure of a presumptively open proceeding is to withstand a first amendment challenge, that the court make specific, on-the-record, factfindings demonstrating that a substantial probability exists that an interest of a higher value will be prejudiced and that no reasonable alternatives to closure will adequately protect that interest. 478 U.S. ——, 106 S.Ct. at 2743, 92 L.Ed.2d at 13-14.

Similarly, if the presumption that transcripts will be released is to be effective, once the press files a motion for disclosure, it must be given a meaningful opportunity to be heard before any contrary decision is made. *See e.g., In re Washington Post Co.*, 807 F.2d 383 (4th Cir.

1986). Pursuant to *Press II*, if the judge denies post-trial disclosure of the requested transcript, he must make specific, on-the-record factfindings demonstrating a substantial probability that higher values will be prejudiced and that reasonable alternatives cannot adequately protect those values.

We do not, however, imply that the court must hold a hearing and write redundant findings of fact that merely reiterate truisms. *See Harrelson*, 713 F.2d at 1117 (that the court held no unnecessary hearing to establish that the press is "tenacious in pursuing information" did not render invalid the order restricting press interviews of jurors). For example, as discussed below, the redaction of jurors' names in the circumstances presented here was justified; the court's excision of portions of the record comprising bench or *in camera* conferences is within its discretion and need not be the subject of a hearing. *See Gurney*, 558 F.2d at 1210 ("Such conferences are an integral part of the internal management of trial and screening them from access by the press is well within a trial judge's broad discretion.) The unredacted transcripts are, of course, subject to this Court's appellate review.

Redaction of Transcripts

The *Press I* Court instructed that redaction of juror names or portions of the transcript may constitute a reasonable alternative to safeguard jurors from unwarranted embarrassment and yet preserve the competing interests served by disclosure.[7] Times-Picayune notes

[7] The Court stated, in pertinent part:

"When limited closure is ordered the constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceedings available within a reasonable time," if the judge determines that disclosure can be accomplished while safeguarding the jurors' valid privacy interests. Even then, a valid privacy

that in *Press I* the Court was concerned with the potential embarrassment to jurors that would stem from public discussion of highly personal attitudes, and perhaps experiences, concerning sex and rape. The jurors here expressed discomfort about betraying confidences shared with them by other jurors. Times-Picayune argues that this "minor discomfort" of jurors does not warrant the level of solicitude afforded the jurors in *Press I*. Thus, they assert, the permanent redaction of the jurors's names in the transcripts was error.

We disagree. The usefulness of releasing jurors' names appears to us highly questionable. The transcripts will reveal the substance and significance of the issues. Had the jury deliberations resulted in conviction, the issue of juror bias would inevitably have been appealed, with the unexpurgated transcript available as a matter of record. Had the government seriously suspected that a particular juror had been compromised, and had those suspicions been substantiated, collateral proceedings subject to the full gamut of first amendment challenges would follow. In *Gurney*, 558 F.2d 1202 (5th Cir.1977), we held that the trial judge's refusal to release the names and addresses of jurors violated no first amendment right of access. Our Court has recognized that, although post-trial restrictions on news gathering must be narrowly tailored, the jurors are entitled to privacy and protection from harassment even after completing their duties. *In re Express News*, 695 F.2d 807 (5th Cir. 1982). In *Harrelson*, 713 F.2d 1114 (5th Cir. 1983), the press raised a first amendment challenge to the court's post-trial motion that prohibited the press from making repeated interview requests once a juror has refused, and

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right may rise to a level that part of the transcript should be sealed, or the name of a juror withheld, to protect the person from embarrassment."

Press I, 464 U.S. at 512, 104 S.Ct. at 825.

from inquiring into a specific vote by a juror other than the juror being interviewed. We find no intervening decisions by the Supreme Court that overrule these cases. Moreover, Times-Picayune raises no issue concerning post-trial restrictions on its ability to interview jurors after the trial. We find no error in the court's refusal to release jurors' names in the transcript.[8]

AFFIRMED.

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[8] We have reviewed the full transcript of the closed proceedings and conclude that the excised portions are within the gamut of issues discussed in bench conferences. We find no error in the court's redaction of the transcripts.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-3298

UNITED STATES OF AMERICA,
Plaintiff,

versus

EDWIN W. EDWARDS, *et al.*,
Defendants,

versus

TIMES-PICAYUNE PUBLISHING CORP.,
GANNETT NEW SERVICES, INC., *et al.*,
Appellants.

Appeal from the United States District Court
for the Eastern District of Louisiana

[Filed May 9, 1986]

Before WILLIAMS, GARWOOD, and JOLLY, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellants' emergency motion for expedited appeal is DENIED.

IT IS FURTHER ORDERED that appellants' alternative emergency petition for writ of mandamus and prohibition is DENIED.

The Court has reviewed the district court's challenged orders and the sealed transcripts of the in-chambers proceedings concerning reports of comments assertedly made by one or more jurors. We are informed that the case was submitted to the jury on May 8, but so far as we are aware a verdict has not been returned and the jury has not been discharged. On the basis of the material presently before us, we are unable to now conclude that the district court erred or abused its discretion in excluding the public from the in-chambers proceedings, or in sealing them or ordering court personnel not to publicly comment concerning them. This ruling is made without prejudice to any further review (or relief by motion) on more complete briefing and a possibly fuller record affording more of the entire trial context. This ruling also does not address unsealing the transcripts, and removing the ban on court personnel public comment, at the conclusion of the trial; such matters should be addressed in the first instance by the district court at that time, and if the court then declines to unseal the transcripts, or lift the ban on comment, adequately specific reasons should be given.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Criminal Action No. 85-0078
Section: E (1)

UNITED STATES OF AMERICA

versus

EDWIN W. EDWARDS, *et al.*

[Filed Apr. 17, 1986, 2:35 p.m.]

ORDER

There was a delay in the proceedings this morning. Basically, I received a report this morning from one of the Deputy Marshals that a juror had discussed some aspect of the previous trial with another juror. I and a representative of the Government and of the defendants questioned each juror individually regarding this incident. Motions to excuse two of the jurors were made. The motions were denied.

Although this jury is sequestered, there is a possibility, however slight, that specifics regarding the incident and the motions may reach the jurors. There has already been an instance in which the Marshals mistakenly did not delete a small newspaper article about this case from the newspaper before allowing the jurors to read it. Although that particular incident was harmless, I do not wish to risk the possibility of specifics of this matter reaching the jury.

Out of an abundance of caution, in order to preserve the impartiality and fairness of the jury,

IT IS ORDERED that the record of this matter be sealed;

IT IS FURTHER ORDERED that all counsel, parties, and court personnel are not to discuss this matter publicly. Members of the news media may object to this verbally on the record or in writing within 5 days. They may do so verbally at this time or in writing.

Thank you.

New Orleans, Louisiana, April 17, 1986.

/s/ Marcel Livaudais, Jr.
MARCEL LIVAUDAIS, JR.
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Criminal Action No. 85-0078
Section: E (1)

UNITED STATES OF AMERICA

versus

EDWIN W. EDWARDS, *et al.*

[Filed Apr. 22, 1986, 1:03 p.m.]

ORDER

This morning the Court received a report from the Marshal regarding the jury. One juror relayed an incident in which a fellow juror commented about the actions of one of the defendants in the courtroom. Both of the jurors were briefly questioned by the Court and by counsel. Motions were made to excuse the two jurors involved which were denied. The Court finds that the comments of the one juror were of a joking nature and were not serious.

The importance of maintaining a fair and impartial jury in this matter is paramount. The consequences of the news of these motions and the identity of the parties making them reaching the jurors would be devastating to all parties' rights to a fair trial. The jurors are allowed visits with and telephone calls from family and friends, are allowed to watch censored television reports and cen-

sored newspapers. While I would like to think that the Marshal's office operates in a perfect manner and that no mistakes are ever made, the margin for human error is there and has already been demonstrated. In addition, in a few instances I have had to allow jurors to attend to certain crucial personal matters, such as dental attention and a wake of a family member, under the supervision of a Deputy Marshal, outside of sequestration. The jurors are also taken out to restaurants a couple of times per week. These actions are necessary in order to meet the needs of the jurors in terms of convenience and well-being. The jurors cannot be kept locked up for 6 to 8 weeks, 7 days per week, 24 hours per day, with no relief for personal matters or relaxation. This bears directly on the rights of the jury and the right of all parties to a fair trial.

All critical stages of this proceeding have been conducted in open court. The rights of the public and the press to an open trial have been protected by the Court. Convenient access by the press to the proceedings has been assured by the Court by way of the many procedures employed to accommodate them.

The Court is fully cognizant of the First Amendment rights of access of the press and public to the court proceeding. The Court is also aware of the right of the defendants and of the government to a fair and impartial jury. Because of the potential consequences of the specifics of this matter reaching the jury, and the possibility that this might occur given the circumstances surrounding sequestration, and in order to preserve the impartiality of the jury and the attendant rights of the parties thereto,

IT IS ORDERED that the transcript of the procedure involving the jury this morning be placed under seal and that counsel, the parties and the Court personnel refrain

from making any public statements whatever regarding this matter.

New Orleans, Louisiana, April 22, 1986.

/s/ Marcel Livaudais, Jr.
MARCEL LIVAUDAIS, JR.
United States
District Judge

APPENDIX E

MINUTE ENTRY
LIVAUDAIS, J.
May 30, 1986

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Criminal Action No. 85-0078
Section: "E" /1

UNITED STATES OF AMERICA

versus

EDWIN W. EDWARDS, *et al.*

[Filed May 30, 1986]

RULING ON MOTION

The motion of the Times-Picayune Publishing Corporation, Gannett News Service, Inc., Capital City Press, John Marvin Hill, Mark Schleifstein, Bridget O'Brian, and Linda Lightfoot to remove the sealing of the transcripts and to remove the prohibition on public comment relating to the in chambers proceedings occurring April 17, 1986 and April 22, 1986 was submitted on a prior date. The trial was conducted on May 10, 1986, the jury having returned a verdict and the court ordering entry of judgment in accordance therewith on that date. Former defendants, Edwin W. Edwards, Ronald F. Falgout, James J. Wyllie, Jr., Marion D. Edwards, and Gus Mijalis all oppose the granting of the motion by written objections filed on their behalf by Ronald F. Falgout. Marion D.

Edwards filed a separate opposition. The United States opposes by written memorandum the defendants' continued opposition to the unsealing of the transcript.

The First Amendment rights of the press and the public, including the right to have a public trial, weigh heavily in the Court's consideration of the motion. The privacy interests of the jurors also weigh in this determination. As stated in *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 104 S.Ct. 819, 824 (1984), "the presumption of openness [of a criminal trial] may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." The trial court in *Press Enterprise Co.*, closed six weeks of the initial voir dire examination of prospective jurors, while allowing only three days to be open to the public. The Supreme Court reversed, holding "not only was there a failure to articulate findings with the requisite specificity but there was also a failure to consider alternatives to closure and to total suppression of the transcript. The trial judge should seal only such parts of the transcript as necessary to preserve the anonymity of the individuals sought to be protected." 104 S.Ct. at 826.

Bearing this test and these guidelines in mind, the Court now considers the motion to unseal the transcripts of the in chambers proceedings held on April 17 and April 22, 1986. Both of the proceedings were of a similar nature and were initiated by an incident report by one of the Deputy marshals that a juror reported that another juror made some comment to him or her about the trial being conducted or a previous trial. The two jurors who initially made the two reports both expressed the feeling that they were betraying the confidence of the other jurors and that they felt bad about doing that. The

Court previously instructed the jurors once they were impanelled that any such remarks made to them regardless of who made them must be reported to the Court immediately and that failing to do so would be considered a violation of the Court's instructions. Despite the fact that they were so advised, the jurors in question exhibited embarrassment, reluctance, and intimidation in having to report to the Court and in being questioned about remarks made by fellow jurors, with whom they were continually sequestered for approximately six weeks. The constant reassurances by the Court and counsel present that they were not in trouble, that they did the right thing, and that no harm would come to the other juror were made did not assuage the embarrassment and intimidation displayed by the juror in being questioned about the incident. It should be further noted that the Court purposely made the proceeding informal in order to ease the discomfort of the juror and to encourage candor. The prevailing atmosphere was quite different from the full voir dire each juror was subjected to in open court which lasted two weeks.

Following the questioning of the two jurors principally involved in each incident, the Court and counsel engaged in an informal discussion regarding what the procedure should be which consumed the majority of the proceeding. As all present were still in chambers, this portion of the proceeding was no more than a bench conference which is normally on the record and not considered a part of the trial subject to the openness requirement, as counsel speak informally, out of turn, and engage in a conversation with each other and the Court about procedural matters. No questioning was done nor any motions made during this phase.

A third portion of the April 17, 1986 proceedings involved questioning each juror about whether or not the remarks were made to him or her and if that person believed the remarks to be true. The remaining jurors

exhibited the same sort of reluctance and intimidation as the other jurors had and every effort was made to keep the tone as informal as possible in order to ease their embarrassment. There was additional informal conversation between counsel and the Court, followed by motions to excuse two jurors in each incident, and finally the denial of these motions.

All former defendants have objected to the unsealing of any portion of the transcript. Before resorting to this action at this stage of the proceeding, the Court must consider alternatives to closure and to total suppression in accordance with the *Press-Enterprise Co.* decision. The Court finds that a less restrictive alternative to complete closure is to seal only those portions of the transcript which are necessary to preserve the anonymity of the jurors, as well as comments made by counsel which are not part of the argument on the motions to excuse, deal with procedural matters, or which are unnecessarily embarrassing to the jurors involved as it was part of an informal conversation and not part of the proceeding at hand. The Court finds that the identities of the jurors and informal comments made by counsel about the credibility of particular jurors is unnecessarily embarrassing to these jurors, who were summoned to serve and served their civic duty, are now back in their communities and who have been subject to intense publicity through no voluntary action of their own.

The ban on public comments by court personnel, by counsel, and by the parties should be lifted, except in the specifics outlined above.

Based on the foregoing,

IT IS ORDERED that the motion to unseal the transcript and to lift the ban on public comment is GRANTED IN PART. The Court Reporter is hereby DIRECTED to make certain specific deletions in the transcript in accordance herewith.

IT IS FURTHER ORDERED that the motion to unseal the transcript and to lift the ban on public comment is DENIED IN PART as outlined in the Court's reasons expressed *supra*.

/s/ Marcel Livaudais, Jr.

Copy to:

(1) All Counsel of Record

(2) Court Reporter—
Mr. Joseph C. Catalano

(3) Jack M. Weiss, Esquire
400 Poydras Street
30th Fl., Texaco Center
New Orleans, LA. 70130-3195

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-3298 and 86-3495

D.C. Docket No. CR-85-078-E

UNITED STATES OF AMERICA,
Plaintiff,

versus

EDWIN W. EDWARDS, *et al.*,
Defendants-Appellees,

versus

TIMES-PICAYUNE PUBLISHING CORP., and
GANNETT NEWS SERVICES, INC., *et al.*,
Movants-Appellants.

Appeals from the United States District Court
for the Eastern District of Louisiana

[Filed July 31, 1987]

Before WRIGHT*, GEE, and JOLLY, Circuit Judges.

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* Circuit Judge of the Ninth Circuit, sitting by designation.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that movants-appellants pay to defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

July 31, 1987

Issued as Mandate: Sept. 25, 1987

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 86-3298 and 86-3495

UNITED STATES OF AMERICA,
Plaintiff,

versus

EDWIN W. EDWARDS, *et al.*,
Defendants-Appellees,

versus

TIMES-PICAYUNE PUBLISHING CORP.,
GANNETT NEWS SERVICES, INC., *et al.*,
Movants-Appellants.

Appeals from the United States District Court
for the Eastern District of Louisiana

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 7/31/87, 5 Cir., 198-, —— F.2d ——)

[August 31, 1987]

Before WRIGHT,* GEE and JOLLY, Circuit Judges.

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* Circuit Judge of the Ninth Circuit, sitting by designation.

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas Gibbs Gee, Jr.,
United States Circuit Judge

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Criminal Action No. 85-078
Section E

UNITED STATES OF AMERICA,
Plaintiff

v

EDWIN W. EDWARDS, *et al.*,
Defendants

[Received Apr. 17, 1986, 1:15 p.m.]

OBJECTION TO CLOSURE OF COURTROOM AND/OR TO SEALING OF RECORD

NOW INTO COURT, through undersigned counsel, come John Marvin Hill, Gannett News Service, Inc., Bridget O'Brien, Mark Schliefstein, and the Times-Picayune Publishing Corporation, Linda Lightfoot and Capital City Press and object to the closed proceedings being conducted in this important criminal trial and to the sealing of the record thereof on the ground that no justification exists or has been shown for such action; no findings have been made to support such action; no hearing upon adequate notice has been held to consider such action, all in violation of rights of the press and public as guaranteed by the United States Constitution, the 1974 Louisiana Constitution, and other applicable law, including *Richmond Newspapers, Inc. v. Commonwealth of Virginia*, 448 U.S. 555 (1980) and the authorities cited therein.

Respectfully submitted,

PHELPS, DUNBAR, MARKS,
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By: /s/ Jack M. Weiss
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